Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1976

No. 76-322

GENE SLAGLE, INC., ET AL.,
Petitioners,

vs.

GENERAL TELEPHONE COMPANY OF OHIO
and
THE PUBLIC UTILITIES COMMISSION
OF OHIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

COMES NOW Gene Slagle, Inc., on its own behalf and on behalf of all subscribers of General Telephone Company of Ohio similarly situated, and respectfully petitions this Honorable Court to issue a writ of certiorari to the Supreme Court of Ohio to review that Court's decision in *General Telephone Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 124, which reversed a decision of The Public Utilities Commission of Ohio (PUCO) executing that Court's mandate in *Gene Slagle, Inc. v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 44, *cert. denied* 423 U.S. 877 (1975).

OPINIONS BELOW

The PUCO Entry which was reversed by the Ohio Supreme Court is not reported and is printed in the Appendix hereto at Page 40a. The opinion of the Ohio Supreme Court reversing the PUCO's Entry is reported as *General Telephone Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 124 and is printed in the Appendix at Page 35a, as is that Court's opinion in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 105, relied upon for such reversal (Appendix, Page 13a). The order of the Ohio Supreme Court denying rehearing is not reported and is printed in the Appendix at Page 39a.

JURISDICTION

The Ohio Supreme Court's decision herein was entered on May 5, 1976, and its order denying rehearing was entered on June 4, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Are a public utility's customers deprived of their property without due process of law when they are required to continue to pay increased rates and charges for utility services under an order of a state agency which was issued contrary to state law?

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, United States Constitution, §1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

On April 9, 1970, General Telephone Company of Ohio (General Telephone) filed an application with the PUCO for authority to increase its rates and charges for telephone service throughout its service area. On August 17, 1971, the PUCO authorized a $4.7 million rate increase. On June 21, 1972, the Ohio Supreme Court reversed and set aside the PUCO's rate order on the ground that the PUCO had not set forth in sufficient detail the reasons prompting its decision as required by Ohio Revised Code §4903.09 and remanded the cause with instructions that the PUCO comply with that statute. *General Telephone Co. v. Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271 (Appendix, Page 1a). Pending compliance by the PUCO with the Ohio Supreme Court's mandate, General Telephone continued to collect the rate increase.

On September 5, 1973, petitioner filed a complaint with the PUCO alleging that General Telephone's rates and charges subsequent to June 21, 1972 were unlawful in view of the Ohio Supreme Court's June 21, 1972 decision, *supra*, and the applicable statutory law. On January 10, 1974, the PUCO dismissed petitioner's complaint, from which decision petitioner appealed.

On January 29, 1975, the Ohio Supreme Court reversed the PUCO's order dismissing petitioner's complaint and ordered the PUCO to enter judgment in accordance with the Court's opinion. In so doing, the Court distinguished certain cases cited by General Telephone as supporting its continued charges on the basis that the PUCO's August 17, 1971 rate order was "clearly unlawful"; and it followed, therefore, that General Telephone should not have continued to col-

lect the unlawful rates. *Gene Slagle, Inc. v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 44, *cert. denied* 423 U.S. 877 (1975) (Appendix, Page 9a). On June 10, 1975, the PUCO entered judgment on the complaint in accordance with the Ohio Supreme Court's mandate, from which decision General Telephone took a further appeal.

General Telephone's further appeal in this matter was directed at the PUCO's holding that the Ohio Supreme Court's decision in the *Slagle* case, *supra*, was determinative of all of the issues before the PUCO and exhausted the PUCO's jurisdiction except as required to execute the Court's mandate. However, during the pendency of this appeal, the Ohio Supreme Court had occasion to reconsider its decision in *Slagle*, *supra*, in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 105 (Appendix, Page 13a); and despite the distinctions urged by the appellant and by petitioner, as *amicus curiae* therein, between *Slagle* and the facts of that case, the Ohio Supreme Court, less than 13 months after its initial decision, overruled the *Slagle* case and applied that result in reversing the PUCO's June 10, 1975 order in the instant case. *General Telephone Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 124 (Appendix, Page 35a).

REASONS FOR GRANTING THE WRIT

While the Ohio Supreme Court's opinion in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm., supra*, as applied to the circumstances confronting it in that case, might avert a constitutional challenge despite the Court's obviously strained and illogical construc-

tion of the applicable Ohio statutes, no such result is possible under the circumstances of the instant case.

In the instant case, the salient and undisputed fact is that the rate order under which General Telephone continued to collect its charges from petitioner and from its more than 300,000 other subscribers was issued in clear violation of the applicable state law (Ohio Revised Code §4903.09). Further, the absolute illegality of that order was declared, not once, but twice, by the very same Court; first, in the Court's 1972 decision in *General Telephone Co. v. Pub. Util. Comm., supra*, and, again, in the instant case. *Gene Slagle, Inc. v. Pub. Util. Comm., supra*. Nothing in either *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm., supra*, or the Court's May 5, 1976 decision herein has changed that fact nor the resulting anomaly that, under the Ohio Supreme Court's decision herein, a public utility's subscribers may be subjected to increased rates and charges even though the action of the responsible state agency in authorizing such charges was "clearly unlawful."

In attempting to rationalize this result, the majority opinion in the *Cleveland Elec. Illuminating Co.* case, *supra*, addresses itself to the alleged fairness and practicality of its decision. (Section ID. of Judge Stern's opinion). Petitioner submits, however, that the rationalizations employed are all premised on the assumption that petitioner's insistence that it be accorded the full protection of the Ohio law is a mere technicality. If this be true, which petitioner denies, it is a technicality of constitutional dimensions.

The only protection which Ohio's public utility ratepayers have from unreasonable or unlawful rates and charges is the Ohio public utility rate-making statute.

That statute prescribes in clear and minute detail the exact procedures to be followed in the establishment of public utility rates and public utility rate increases by the PUCO. In the instant case, that statute was clearly and indisputably not followed—not just in a manner which would cast doubt upon the reasonableness of the PUCO's decision but in a manner which nullified the entire rate-making process. Under such circumstances, petitioner submits, requiring petitioner and General Telephone's more than 300,000 other subscribers to pay the unlawful charges, under whatever theory or considerations of so-called equity, deprives petitioner and those similarly situated of their property without due process of law.

This Honorable Court has long recognized that inherent in the due process guarantee of the Fourteenth Amendment to the Constitution of the United States is the right to be protected from arbitrary or unlawful administrative action. Cf. *Vitrarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dalles*, 354 U.S. 363 (1957); and *Wong Yang Sung v. McGrath*, 339 U.S. 33 (1950). Further, this Court has held that where, upon review of an agency order, a court finds the same to be unlawful and sets it aside, the reviewing court is powerless to give effect to the agency's action [Cf. *Securities & Exchange Comm. v. Chenery Corp.*, 318 U.S. 80 (1943)], even though the reviewing court might entertain serious doubts concerning the wisdom or lack thereof of the legislature in prescribing the course chosen. Cf. *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475 (1942).

The Ohio Supreme Court's decision herein violates these well-established principles of law. In overruling its initial decision in the instant case, the Ohio Supreme Court would give effect to the PUCO's unlawful order despite the express requirements of the applicable Ohio statute; and it would do so purportedly to

protect the public utility from the alleged unforeseen consequences of undue administrative delay, even though the obvious result is to subject the utility's subscribers to unlawful utility rates. Given the scope of the Ohio Supreme Court's decision, including its impact not only on General Telephone's more than 300,000 subscribers in this case but on Ohio's consumers generally, and given the clear violation of petitioner's constitutional right to due process of law which exists in this case, petitioner respectfully, but urgently, urges this Honorable Court to grant its petition.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the decision and judgment of the Supreme Court of Ohio.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio were sent by United States first class mail, postage prepaid, to counsel representing the parties to this proceeding this 30th day of August, 1976.

DAVID L. PEMBERTON

APPENDIX

GENERAL TELEPHONE CO. OF OHIO, APPELLANT. *v.* PUBLIC UTILITIES COMMISSION OF OHIO, APPELLEE.

[Cite as General Telephone Co. v. Pub. Utii. Comm. (1972), 30 Ohio St. 2d 271.]

Public Utilities Commission—Determination of utility rate of return—Appeal—Evidence—Order of commission insufficient, when—Reasons for decision insufficiently detailed—Order of commission reversed, when—Remand to commission.

In a public utility rate case, if the Public Utilities Commission has not set forth in its order the reasons prompting its decision in sufficient detail to enable the Supreme Court, upon appeal, to determine how the commission reached its decision, the order will be set aside, and the cause remanded to the commission, with instructions to set forth the reasons prompting its decision.

(No. 71-712—Decided June 21, 1972.)

APPEAL from the Public Utilities Commission of Ohio.

On April 9, 1970, appellant, General Telephone Company of Ohio, filed an application with the Public Utilities Commission for authority to increase its rates and charges. Sixteen municipalities, several townships and the President and the Board of Trustees of Ohio University were granted leave to intervene.

On December 8, 1970, the staff of the commission filed its report, recommending a statutory rate base of $182,039,769 for a date certain of June 30, 1969, and indicating that appellant's present rates produce a return of 5.96% on that statutory rate base. Objections to the staff's report were filed by interveners and by General.

Testimony was heard by the commission, and on April 20, 1971, General and the active interveners, with the exception of Ohio University, jointly presented a stipulation and recommendation to the commission.

On August 17, 1971, the commission issued its opinion and order in which it declined to accept the stipulation and recommendation. The commission determined appellant's statutory rate base to be $182,508,-351; that its current revenues and expenses resulted in a rate of return of 5.67%; that such rate of return is insufficient to provide appellant with a reasonable compensation and return; that appellant is entitled to a rate of return of 6.95%, yielding a dollar amount of return of $12,684,330; and that appellant is authorized to establish rates that would produce an annual increase in revenue of $4,698,886.

Appellant filed an application for rehearing on September 3, 1971, which was granted for the purpose of reviewing the rate structure to produce the additional revenues authorized by the order of August 17, 1971, and which was denied in all other respects.

Because of the economic stabilization act of 1970, as amended, and federal orders pursuant thereto, the new rates were not to be effective until November 16, 1971.

Appellant filed its notice of appeal with the commission and with this court on November 10, 1971.

The cause is before this court pursuant to an appeal as a matter of right.

Messrs. Power, Jones & Schneider and *Mr. John Robert Jones*, for appellant.

Mr. William J. Brown, attorney general, and *Mr. Thomas P. Michael*, for appellee Public Utilities Commission.

Messrs. Steer, Strauss, White & Tobias and *Mr. Theodore K. High*, for intervener-appellees.

STERN, J. Appellant contends that the commission erred in computing the rate of return to which it is entitled, in that (1) the commission determined the dollar amount of return prior to determining the rate of return, and (2) that such determination was based on the actual capitalization of the utility rather than the statutory rate base.

This court, in *Cleveland v. Pub. Util. Comm.* (1956), 164 Ohio St. 442, set forth six steps which the commission must follow in a rate case of this nature. We are concerned herein with the first three steps, which in substance are as follows:

1. Statutory Rate Base: Determine the dollar amount of a date certain of the reconstruction cost new less existing depreciation of the property of the public utility used and useful in rendering the public utility service for which rates are to be fixed.

2. Rate of Return: Determine what percentage will represent a fair annual rate of return on the property so used and useful in rendering such public utility service, as will thereby represent a yearly reasonable compensation for the service rendered.

3. Dollar Amount of Return: Determine the dollar annual return to which the utility is entitled by applying the rate of return percentage against the dollar amount of the statutory rate base.[1]

[1] The remaining three steps are: (4) Annual Expenses: Determine the dollar amount of the cost of rendering the public utility service for a particular year. (5) Allowable Gross Revenues: Add the dollar amount of return to the annual expenses. (6) Rates: Fix rates for the service rendered which would have provided the public utility for the particular year with an amount equal to such allowable gross revenues.

To hold that the rate of return must be firmly determined without reference to the dollar amount of return which it will yield, would be to deny the commission the use of meaningful working figures.[2] The commission must, therefore, be permitted to simultaneously determine steps 2 and 3 in its endeavor to arrive at a yearly reasonable compensation for the services rendered.

The commission may not, however, *determine or test* a rate of return or a dollar amount of return by referring to the actual capitalization of the utility involved. As stated in *Cleveland v. Pub. Util. Comm.*, *supra*, at 444:

"* * * under the Ohio statutes and the decisions of this court, the percentage return is to be related not to the 'total capitalization' or to the 'net investment' but to the statutory rate base (reconstruction cost new less depreciation) so that *neither the actual capital of or net investment in this public utility nor its actual earnings requirements are really material* in a proceeding of this kind. Any such method of *determining or testing* the dollar amount of return as that which is advanced by appellants would eliminate any need at all for determining the statutory rate base. The reasons advanced in support of such arguments have previously been considered and rejected as unsound by this court. * * *" See *Lima Telephone & Telegraph Co. v. Pub. Util. Comm.* (1918), 98 Ohio St. 110; *Lindsey v. Pub. Util. Comm.* (1924), 111 Ohio St. 6; *East Ohio*

[2] As stated by Judge Gibson in his dissenting opinion in *Ohio Fuel Gas Co. v. Pub. Util. Comm.* (1963), 174 Ohio St. 585, 601: "as a matter of mathematics the percentage figure representing the rate of return is merely a means of showing the relationship between the reproduction cost new less depreciation value of utility property and the dollar return realized or to be realized thereon."

Gas Co. v. Pub. Util. Comm. (1938), 133 Ohio St. 212; *Marietta v. Pub. Util. Comm.* (1947), 148 Ohio St. 173; *Cleveland v. Pub. Util. Comm., supra* (164 Ohio St. 442); *Ohio Fuel Gas Co. v. Pub. Util. Comm.* (1960), 171 Ohio St. 10; *Ohio Edison Co. v. Pub. Util. Comm.* (1962), 173 Ohio St. 478; *General Telephone Co. v. Pub. Util. Comm.* (1963), 174 Ohio St. 575; and *Kenton v. Pub. Util. Comm.* (1965), 3 Ohio St. 2d 71.

Appellant's contention that the commission improperly referred to the actual capitalization of the utility rather than its statutory rate base in determining the rate of return stems from the following language from the order of the commission:

"A rate of return of 6.95% applied to the rate base of $182,508,351 produces an allowed dollar return of $12,684,330. Applicant's witness aforesaid has determined that applicant's annual cost of debt is $5,766,-700 and the annual dividend requirement of preferred stock is $480,731, a total of $6,247,431. Deducting these fixed charges from the allowable return of $12,-684,330 leaves an amount of $6,436,899 available for common equity. This represents a rate of return on common equity of 10.37% which is within the limits of the return on average book equity for twelve other General Telephone operating companies (Meyer Exhibit 1, Schedule 7). Based on applicant's 1,920,000 outstanding common shares the earnings per common share will be $3.35. If applicant continues the annual dividend on common stock in effect for many years of $2.50 per share, the payout ratio would be less than 75%. Thus applicant would be able to retain a reasonable amount in the business to provide for contingencies and additional funds for plant investment."

Appellant's uncontested interpretation of the above

language is that the commission related the dollar amount of return on common equity to appellant's actual capitalization of $171,346,000 [3] rather than the computated statutory rate base.[4] ($182,508,351.) Such a procedure attributes the entire $11,162,351 difference (statutory rate base minus capitalization) to an increase in equity, and does not comply with law of Ohio.

A rate of return cannot be justified by testing it against the actual capitalization, and although it is contended that the use of the statutory rate base, rather than actual capitalization, gives a utility an excessive actual return, the remedy for this situation lies in the legislative branch of the government and not in the courts. See *Marietta v. Pub. Util. Comm., supra* (148 Ohio St. 173, 183).

Furthermore, the above quoted language from the order of the commission (pertaining only to the rate of return on common equity), is the only portion of the commission's order which provides any substantive indication of the procedure actually used in determining the rate of return or dollar amount of return. The only evidence found in the record pertaining to the rate of return is that provided by appellant, and al-

[3] Appellant's capitalization was set forth as follows:

Common Equity	$ 62,077,000
Preferred Stock	10,201,000
Mortgage Bonds	84,068,000
Debentures	15,000,000
Total	$171,346,000

[4] Appellant contends that the actual return on equity would be only 8.79% rather than 10.37%. Appellant arrives at this figure by subtracting the sum of $99,068,000 of debt and $10,201,450 of preferred stock from the statutory rate base, and dividing the commission's computed amount available for equity ($6,436,899) by the remainder ($73,238,901).

though the commission is not bound to follow appellant's recommendations, it must show the reasons prompting the decisions arrived at.

The commission contends that the quoted language was intended only to illustrate the effects its determination would have on the actual capital of the utility, and that the remainder of the opinion and order indicates that the procedure set out in *Ohio Edison Co. v. Pub. Util. Comm., supra* (173 Ohio St. 478, 489), was properly followed in arriving at the rate of return and the dollar amount of return. As previously pointed out, a rate of return cannot be justified by testing it against the actual capitalization. Further, having examined the entire order, we find no additional satisfactory explanation of the procedure used by the commission.[5]

The commission contends further that its failure to specifically set forth the reasons explaining how it computed the rate of return is not dispositive, because, no request having been specifically made, the commission could not have *refused* to set forth its reasons. (See paragraph six of the syllabus of *Ohio Edison Co. v. Pub. Util. Comm., supra* [173 Ohio St. 478].)

Upon examination of the record, we find that the issues raised by appellant before the commission were sufficient to require the commission to set forth its

[5] The only other statement in the order relating to the procedure used by the commission is that:

"Upon consideration of all the facts of record in this proceeding, including the opinion testimony and exhibits of applicant's rate of return witness, the commission is of the opinion that a rate of return of 6.95% constitutes a fair and reasonable rate of return on the value of applicant's property dedicated to providing telephone services within its operating area. In reaching its determination, the commission has taken into consideration what amount would be reasonably required by applicant to provide for such items as interest on debt, dividends on outstanding stock, and the reservation for surplus."

reasons. Further, R. C. 4903.09 specifically requires that:

"In all contested cases heard by the Public Utilities Commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact and written opinions *setting forth the reasons prompting the decisions arrived at*, based upon said findings of fact." (Emphasis added.)

The record being incomplete, no decision as to the reasonableness of the determined rate of return can be made.

We hold, therefore, that where the commission has not set forth in its order its reasons in sufficient detail to enable the Supreme Court, upon appeal, to determine how the commission reached its decision, the order will be set aside.

The order of the Public Utilities Commission is reversed, and the cause is remanded for compliance herewith.

Order reversed.

O'NEILL, C. J., SCHNEIDER, HERBERT, CORRIGAN, LEACH and BROWN, JJ., concur.

GENE SLAGLE, INC., ET AL., APPELLANTS, *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL., APPELLEES.

[Cite as Gene Slagle, Inc., v. Pub. Util. Comm. (1975), 41 Ohio St. 2d 44.]

Telephone company—Application for rate increase approved—Supreme Court reversal and remand to set forth reasons—Former rates charged, when.

(No. 74-414—Decided January 29, 1975.)

APPEAL from the Public Utilities Commission.

This matter arises out of a prior decision of this court involving appellees herein, General Telephone Company of Ohio and the Public Utilities Commission of Ohio.

On April 9, 1970, General Telephone filed an application with the commission for authority to increase its rates and charges. On August 17, 1971, the commission issued its opinion and order (case No. 36,476) approving a rate increase, but at a lower percentage than that sought by the company. However, due to federal orders pursuant to the Economic Stabilization Act of 1970, the new rates were not effective until November 16, 1971.

Subsequent to the above order of the commission, General Telephone filed an appeal with this court. On June 21, 1972, this court reversed the order of the commission and stated in the syllabus that "* * * if the Public Utilities Commission has not set forth in its order the reasons prompting its decision in sufficient detail to enable the Supreme Court, upon appeal, to determine how the commission reached its decision, the order will be set aside * * *." *General Telephone Co. v. Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271,

285 N. E. 2d 34. The cause was therefore remanded to the commission, with instructions to set forth the reasons prompting its decision.

In compliance with that mandate, the commission reissued its opinion and order on September 29, 1972. This order explained the commission's August 17, 1971, decision in greater detail, and had the effect of incorporating substantially all the findings of that determination. Thus, the commission authorized the same rates which it had previousy granted, and which General Telephone had maintained since November 16, 1971.

On September 5, 1973, appellants filed a complaint with the commission, alleging, in part, that this court's decision in *General Telephone Co., supra*, reversed the commission's opinion and order of August 17, 1971, and therefore, the utility company should have reverted to charging those rates in effect prior to the November 16, 1971, increase. General Telephone's motion to dismiss the complaint was sustained, and appellants then filed an application for rehearing. After denial by the commission, appellants appealed to this court as a matter of right.

Messrs. Muldoon & Pemberton and *Mr. David L. Pemberton*, for appellants.

Mr. William J. Brown, attorney general, *Mr. Keith F. Henley* and *Mr. Marvin I. Resnik*, for appellee Public Utilities Commission.

Messrs. Power, Jones & Schneider, Mr. John Robert Jones and *Mr. Andrew T. Jones*, for appellee General Telephone Company of Ohio.

Per Curiam. Where a public utility appeals a rate increase as being inadequate, and this court reverses the order which granted the increase and remands the

cause to the Public Utilities Commission, with instructions to set forth the reasons prompting its decision, are the increased rates to be charged until compliance by the commission upon remand or must the rates be lowered to what they were before the increase?

R. C. 4903.09 provides, in part, that "[i]n all contested cases heard by the Public Utilities Commission, a complete record of all proceedings shall be made, including * * * findings of fact and written opinions setting forth the reasons prompting the decisions arrived at * * *." In *General Telephone Co. v. Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271, 285 N. E. 2d 34, this court agreed with General Telephone that the order in that case should be reversed because the commission had failed to sufficiently set forth the reasons prompting its decision, as mandated by R. C. 4903.09. The order was clearly unlawful. It follows, therefore, that General Telephone should not have continued to collect rates pursuant to an order which was unlawful and which had been reversed by this court.

Appellees contend, however, that even if the public utility could not continue to charge the increased rates established by the order, which was reversed in *General Telephone, supra*, it would be improper for the rates in effect prior to such order to be reinstated. Their assertion is based primarily upon the decision in *Cincinnati & Suburban Bell Telephone Co. v. Pub. Util. Comm.* (1923), 107 Ohio St. 370, 140 N. E. 86. In an effort to comprehend that case, however, attention must also be directed to *Cincinnati v. Pub. Util. Comm.* (1922), 105 Ohio St. 181, 137 N. E. 36. In viewing what transpired in those unusual cases, we do not consider them helpful in resolving the issue at hand. Furthermore, the reversal involved in those

cases was ordered without any reason being given therefor. In *General Telephone Co. v. Pub. Util. Comm., supra,* the court specifically withheld consideration of the reasonableness of the rate ordered, placing the reversal upon the sole ground of a failure by the commission to observe the requirements of R. C. 4903.09. Cf. *Cincinnati & Suburban Bell Telephone Co. v. Pub. Util. Comm., supra.*

It is our conclusion that when the order of August 17, 1971, was reversed by this court, the increased rates pursuant to such order could no longer be lawfully charged, and those rates in effect prior to the above order were reinstated by operation of law, and continued in effect until further order of the commission.

The order sustaining the motion to dismiss the complaint is unlawful and must be reversed.

Order reversed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE and W. BROWN JJ., concur.

THE CLEVELAND ELECTRIC ILLUMINATING CO., APPELLANT, *v.* PUBLIC UTILITIES COMMISSION OF OHIO, APPELLEE.

(Two cases.)

[Cite as Cleveland Elec. Illuminating Co. v. Pub. Util. Comm. (1976), 46 Ohio St. 2d 105.]

Public Utilities Commission—Appeal to Supreme Court—Authority of court—Reversal and remand of order—Effect.

1. In an appeal from an order of the Public Utilities Commission, the authority to remand the cause to the commission is a necessary concomitant of this court's jurisdiction to reverse, vacate, or modify. (R. C. 4903.13 construed.)
2. When this court reverses and remands an order of the Public Utilities Commission establishing a revised rate schedule for a public utility, the reversal does not reinstate the rates in effect before the commission's order or replace that rate schedule as a matter of law, but is a mandate to the commission to issue a new order, and the rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order. *(Gene Slagle, Inc., v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 44, overruled.)

(Nos. 75-740 and 75-741—Decided May 5, 1976.)

APPEALS from the Public Utilities Commission.

The Cleveland Electric Illuminating Company, the appellant, is a public utility providing electric service in northeastern Ohio. On October 7, 1971, appellant

applied to the Public Utilities Commission of Ohio for an increase in electric service rates. After hearings on the application, the commission, on November 28, 1973, issued an opinion and order authorizing an increase in rates, and thereafter approved revised rate schedules filed by the appellant in conformity with that order.

The order was the subject of three appeals to this court, one by the appellant and two by intervening appellants. All three appeals were decided by this court, on June 11, 1975, in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 42 Ohio St. 2d 403, 330 N. E. 2d 1, a decision which affirmed in part and reversed in part the November 28, 1973, order and remanded the cause to the commission for further proceedings in accordance with the opinion. The overall effect of the decision was to agree with the utility that it was entitled to rates higher than those granted by the commission in its order.

The utility immediately filed with the commission an application for authority to refile its existing rate schedule, and on June 13, 1975, the commission issued an order authorizing the refiling of the existing schedule.

On June 16, 1975, the commission on its own motion found that the entry of June 13, 1975, was improper, as in conflict with this court's decision in *Gene Slagle, Inc., v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 44, 322 N. E. 2d 640. The commission found that the June 13th entry should be held to be of no effect, and that those rates in effect prior to the November 28, 1973 order were reinstated by operation of law. Thereafter, on June 17, the appellant filed a motion for clarification in this court, requesting a directive that this court's prior decision did not have the effect of reinstating the earlier rate schedule by operation of law, or in the alternative, requesting a stay order pending the decision of the commission on remand. The commission joined in the motion for clarification. On June 20, the appellant made a supplemental motion for a stay of the order of June 16.

On the same day, June 20, this court granted a temporary stay of the June 16 order. Thereafter, on June 24, we overruled the motion for clarification and extended the stay of the June 16 order of the commission, pending a decision of the commission on remand. The opinion and order of the commission on remand, allowing the appellant to file new rate schedules, was rendered on July 3.

The appellant filed timely appeals from the commission's June 16 order, and the cause is now before this court as a matter of right.

Messrs. Squire, Sanders & Dempsey, Mr. John Lansdale, Mr. Alan P. Buchmann, Mr. Richard A. Miller and *Mr. Alan D. Wright*, for appellant.

Mr. William J. Brown, attorney general, *Mr. Charles S. Rawlings* and *Ms. Cheryl K. Hackman*, for appellee.

STERN, J. In *Gene Slagle, Inc., v. Pub. Util. Comm., supra*, at page 46, it was held that when an order of the commission changing utility rates has been reversed by this court for failing to adequately set forth the reasons prompting the decision, "the increased rates pursuant to such order could no longer be lawfully charged, and those rates in effect prior to the above order were reinstated by operation of law, and continued in effect until further order of the commission." The utility raises two issues in this case: whether *Slagle* applies to this court's decision in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*

(1975), 42 Ohio St. 2d 403, 330 N. E. 2d 1, and whether *Slagle* was erroneous and should be overruled. Since the utility raises substantial questions as to the correctness of *Slagle* itself, we find it appropriate to begin our consideration with that issue.

I.

The difficulty presented in this case and in *Slagle* is that the statutory plan for public utility regulation set out in Title 49 of the Revised Code does not specifically prescribe the immediate effect upon existing rates of this court's reversal of a commission order revising rates; nor do the statutes prescribe a particular procedure to be followed.

The process of public utility rate-making in Ohio is wholly controlled by statute. Any public utility desiring to establish a rate or to change an existing rate must file a written application with the commission. R. C. 4909.18. The duty of the commission is to determine the justness and reasonableness of the proposed rates, based upon the valuation of the utility's property, giving due regard to relevant factors such as the necessity for making reservations for surplus, depreciation and contingencies, and such other matters as are proper according to the facts of each case. R. C. 4909.15.

The process of rate-making frequently involves extensive hearings, voluminous testimony, and the determination of difficult and abstruse technical questions which must be resolved on the basis of complex and often disputed evidence. The function of the commission is to carry through this process, in accordance with the stautory plan, and to fix lawful and reasonable rates based upon the evidence presented.

The function and jurisdiction of this court in an appeal from an order of the commission is limited.

Under R. C. 4903.13, our task is to affirm an order of the commission if it is not unreasonable or unlawful. This court has often emphasized the limited nature of that authority.[1]

Our function is not to weigh the evidence or to choose between alternative, fairly debatable rate structures. That would be to interfere with the jurisdiction and competence of the commission and to assume powers which this court is not suited to exercise. "* * * The members of this court are neither accountants nor engineers, and manifestly it would be unfair to the litigants and to the commission for the court to pretend that it is in a position to better evaluate the evidence and determine the difficult question of the reasonablenes of the order than is the commission." *Dayton v. Pub. Util. Comm.* (1962), 174 Ohio St. 160, 162, 187 N. E. 2d 150. Our task is not to set rates; it is only to assure that the rates are not unlawful or unreasonable, and that the rate-making process itself is lawfully carried out.

In large measure, the purpose of the decision in *Slagle* was to affirm the limited nature of this court's jurisdiction in these types of cases. Our decision was that this court's reversal of a commission order rendered that order of no further legal effect. Upon a literal reading of the duties of this court under R. C. 4903.13, that decision is a logical result, for the statute directs that the order be "reversed, vacated or modified" if found to be unreasonable or unlawful.

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[1] *E.g., Ohio Bus Line v. Pub. Util. Comm.* (1972), 29 Ohio St. 2d 222, 280 N. E. 2d 907; *Akron v. Pub. Util. Comm.* (1966), 5 Ohio St. 2d 237, 215 N. E. 2d 366; *Mt. Vernon Tel. Corp. v. Pub. Util. Comm.* (1955), 163 Ohio St. 381, 127 N. E. 2d 14; *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1951), 155 Ohio St. 526, 99 N. E. 2d 653; *Cincinnati v. Pub. Util. Comm.* (1950), 153 Ohio St. 56, 90 N. E. 2d 681.

The order which this court reversed in *General Telephone Co. v. Pub. Util. Comm.* (1972), 30 Ohio St. 2d 271, 285 N. E. 2d 34, and which was later at issue in *Slagle*, was an order which was defective because the commission had failed to carry out its statutory duty to provide adequate findings of fact and conclusions of law. This court could not modify the order without indulging in extensive examination of the record and improper speculation as to the actual basis for the decisions made by the commission, nor could this court determine that the order was based upon the evidence. Upon a literal reading of R. C. 4903.13, it would appear that this court might only reverse or vacate the order, in the sense of ending the order's legal effect, while leaving any subsequent proceedings for remedying defects in the order to the judgment of the commission.

In fact, however, upon further reflection and examination of Ohio's statutory plan for public utility regulation, and of the principles upon which this court's jurisdiction is based, we are now convinced that our decision in *Slagle* was in error and must be reversed. Several considerations compel this conclusion.

I A.

The opinion of this court in *General Telephone* reversed the order of the commission,[2] and in *CEI*, *supra* (42 Ohio St. 2d 403), we reversed in part and affirmed in part. In both cases, this court remanded the causes to the commission.

To "remand" is to send a cause back to the original

[2] In *General Telephone*, the syllabus and opinion stated that the order was to be set aside. "Set aside" and "reverse" are, of course synonomous, both meaning to annul or make void. For example, "reverse" is defined in Black's Law Dictionary (4 ed.) as "to overthrow, vacate, *set aside*, make void, annul, repeal, or revoke * * *." (Emphasis added.)

tribunal for further proceedings, generally upon orders or directions from the higher court. When a court acts to remand a cause, it is not itself finally determining the outcome of the cause, nor is it executing a judgment in favor of one of the parties.[3] The judgment is given legal effect when it is executed by the lower tribunal, and the judgment as rendered is that of the tribunal to which the cause had been remanded. *Carey v. Kemper* (1887), 45 Ohio St. 93, 11 N. E. 130. Since the effective, final judgment upon remand is that of the lower tribunal, it is manifest that this court's judgment does not take effect as a matter of law. In *Roberts v. Montgomery* (1927), 117 Ohio St. 400, 159 N. E. 475, this court was called upon to interpret Section 2 of Article IV of the Constitution, which, then as now, confers the jurisdiction of this court in terms virtually

[3] For example, R. C. 2505.37 provides that:

"When a judgment or final order is reversed, in whole or part, in the * * * Supreme Court, the reviewing court shall render such judgment as the court below should have rendered, or remand the cause to that court for such judgment"

And, R. C. 2505.39 provides that:

"A court which reverses or affirms a judgment or final order upon appeal on questions of law, on which it pronounces judgment, shall not issue execution therein, but shall send a special mandate to the court below for execution thereon."

This latter statute by its terms applies to appeals from courts, and does not mention administrative agencies. However, R. C. Chapter 2505, which sets out the procedure on appeals, applies to "all proceedings whereby one court reviews or retries a cause determined by another court, an administrative officer, tribunal, or commission" (R. C. 2505.01[A]), and R. C. 2505.03 specifically provides that:

"Every final order, judgment, or decree of a court and, when provided by law, the final order of any administrative officer, tribunal, or commission may be reviewed as provided in Sections 2505.04 to 2505.45, inclusive, of the Revised Code, unless otherwise provided by law.* * *"

Present R. C. Sections 2505.01, 2505.03, 2505.37, 2505.39, and 4903.13 were all enacted or reenacted in 1935, in an Act to Establish a Simplified Method of Appellate Review (116 Ohio Laws 104). This procedural scheme might arguably be held to apply to appeals from the commission, since no other procedure is provided by law, but that question is not directly presented here.

identical to R. C. 4903.13, *i. e.*, jurisdiction to "review and affirm, modify, or reverse" the judgment. The court held, in paragraph one of the syllabus, that the authority of this court to remand is "* * * a necessary concomitant of the jurisdiction to review, affirm, modify, or reverse." That decision concerned an appeal from a Court of Appeals, but the same principle must apply here, since virtually identical jurisdictional language is involved. The holding in *Roberts v. Montgomery, supra*, necessarily affirms that this court has authority to remand causes to the commission.

That conclusion is also supported by other authority and by accepted practice.

In *Ford Motor Co. v. Labor Board* (1939), 305 U. S. 364, it was held that a federal Circuit Court of Appeals had inherent authority to remand a cause to a federal board, based upon statutory provisions for review similar to those at bar.[4] This court has also frequently recognized and exercised the authority to remand cases to administrative boards. In *Superior Metal Products v. Admr., Bur. of Employment Services* (1975), 41 Ohio St. 2d 143, 146, 324 N.E. 2d 179, it was stated: "This court holds that the power to reverse and vacate

[4] The statute in that case provided that "* * * the court * * * shall have the same exclusive jurisdiction to grant to the board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the board * * *." The court there stated, at page 373, that:

"It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied. Such a remand may be made to permit further evidence to be taken or additional findings to be made upon essential points."

And, at page 374, the court stated that:

"The 'remand' does not encroach upon administrative functions. It means simply that the case is returned to the administrative body in order that it may take further action in accordance with the applicable law." (Citations omitted.)

decisions necessarily includes the power to remand the cause to the decision maker." The same principle has been applied to various other types of cases,[5] and has been applied as well in order to remand cases for further proceedings even without reversal of the decisions below. *McDowell v. State* (1929), 120 Ohio St. 613, 169 N. E. 299; *Young v. Schenck* (1856), 6 Ohio St. 110.

This court has impliedly recognized the existence of such authority in appeals from the commission on numerous occasions.[6] We have also specifically held that this court has the authority, and even in some cases the duty, to remand causes to the commission. In *East Ohio Gas Co. v. Pub. Util. Comm.* (1938), 133 Ohio St. 212, 12 N. E. 2d 765, paragraph thirteen of the syllabus states:

"Where the court determines that certain findings of the Public Utilities Commission are unreasonable and unlawful while others were properly made, and from the record the court is unable to substitute specific findings for those improperly made by the commission, it is the duty of the court to remand the proceedings to the commission, as a fact finding body, with instructions to carry out the rulings of the court and correct the findings which were found to be unreasonable and unlawful."

[5] *Orley v. Kosydar* (1974), 40 Ohio St. 2d 97, 332 N. E. 2d 665; *Fiddler v. Bd. of Tax Appeals* (1942), 140 Ohio St. 34, 42 N. E. 2d 151; *Neil v. Neil* (1883), 38 Ohio St. 558.

[6] *Motor Service Co. v. Pub. Util. Comm.* (1974), 39 Ohio St. 2d, 5, 313 N. E. 2d 803; *Forest Hills Utility Co. v. Pub. Util. Comm.* (1974), 39 Ohio St. 2d 1, 313 N. E. 2d 801; *General Tel. Co. v. Pub. Util. Comm.* (1962), 173 Ohio St. 280, 181 N. E. 2d 698; *F. & R. Lazarus & Co. v. Pub. Util. Comm.* (1954), 162 Ohio St. 223, 122 N. E. 2d 783; *Elyria Tel. Co. v. Pub. Util. Comm.* (1953), 158 Ohio St. 441, 110 N. E. 2d 59; *Cincinnati v. Pub. Util. Comm.* (1922), 105 Ohio St. 181, 137 N. E. 36.

All of these considerations conclusively establish that this court does possess the authority to remand causes to the commission, as we did in both *General Telephone*, *supra* (30 Ohio St. 2d 271), and *CEI*, *supra*.

As was pointed out above, the effective judgment upon remand is the judgment of the lower tribunal. See R. C. 2505.37 and 2505.39. That principle applies to orders of the commission, and it therefore follows that the execution of this court's judgment of reversal and remand occurs only when the commission carries out the mandate of this court by its order and not, as held in *Slagle*, at the moment of this court's reversal by operation of law.

I B.

In *Cincinnati & Suburban Bell Tel. Co. v. Pub. Util. Comm.* (1923), 107 Ohio St. 370, 140 N. E. 86, this court specifically held that the reversal and remand of a rate schedule did not act to automatically reinstate the rates theretofore in force. The court, at page 374, stated:

" * * * Therefore, when the order of the Public Utilities Commission was reversed by this court, and the cause remanded generally for further proceedings according to law, the cause came again before the Public Utilities Commission for the exercise by it of its judgment, and, if the record before it was not sufficient to enable it to intelligently exercise such judgment, it was its duty to either itself supplement that record or permit the parties interested to make such supplement, and then base its conclusion upon such record."[7]

[7] The court in that case, by its order, also impliedly recognized that the reversal of an order of the commission could be by special mandate, the same procedure which is followed in reversing judgments of Courts of Appeals.

The circumstances of that case were unusual, as pointed out in *Slagle*. The reversal of the rate schedule was ordered without an accompanying majority opinion by the court. Nevertheless, the court did recognize the authority to remand cases to the commission, and recognized, as well, that the reversal and remand did not act to automatically reinstate the previous rate schedule.

A similar issue was presented in *Keco v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254, 141 N. E. 2d 465. In that case, the issue was whether an action for unjust enrichment lies to recover an increase in rates charged by a public utility under an order of the commission, where the order is subsequently reversed by the Supreme Court on the grounds that it is unreasonable and unlawful. The court, in *Keco*, held that an action for restitution did not lie. For the present purposes, it is significant to note the dates involved—the increase in rates was granted by an order dated May 28, 1953; on May 25, 1954, this court reversed and remanded the cause; and on June 4, 1954, the commission issued its order reducing the rates. The appellant sought restitution for the period from May 28, 1953 to June 4, 1954. Thus, this court's dismissal of the entire claim to a right of restitution necessarily held that the original rate order remained in effect during the period after this court's reversal and before the commission's new order.

The opinion in *Keco* did not specifically consider the moment at which this court's reversal and remand of a commission order takes effect, so that the case cannot be considered binding precedent on the issue herein. Nevertheless, that case and the *Cincinnati & Suburban Bell* case, *supra* (107 Ohio St. 370), are persuasive authority and are the only cases on point in Ohio.

I C.

Most importantly, the holding in *Slagle* is incompatible with the statutory scheme for regulation of public utilities established by the General Assembly in Title 49 of the Revised Code.

The basic principle of Ohio's regulatory scheme for utility rates is that those rates are to be set by the commission upon hearings and evidence, and that only those rates which have been found to be fair and reasonable after such hearings may lawfully be charged. Utilities are protected by being assured a fair rate of return, while consumers are protected by being assured that service will be adequate and rates reasonable.

The rates fixed by order of the commission then go into effect immediately unless stayed by the filing of a bond during an appeal, and the order establishes the only rate which the utility may lawfully charge.

The basic argument in support of the position in *Slagle* is that when this court reverses a commission order approving a revised rate schedule, the order and the schedule are then no longer in effect. Therefore, it is argued that R. C. 4905.32 applies, which provides that:

"No public utility shall charge, demand, exact, receive, or collect a different rate, rental, toll, or charge for any service rendered, or to be rendered, than that applicable to such service as specified in its schedule filed with the Public Utilities Commission which is in effect at the time."

There are fundamental practical and statutory objections to that construction of the statute. The logical result of that argument would be that no rate could be charged, since this court had struck down the only rate schedule which was filed and in effect with the

commission. That result would of course be manifestly unfair and perhaps disastrous for the unlucky utility. In other states, it has accordingly been held that the utility in such cases has a right to charge a reasonable rate. *Arizona Corp. Comm. v. Mountain States Tel. & Tel. Co.* (1951), 71 Ariz. 404, 228 P. 2d 749; *Southern Bell Tel. & Tel. Co. v. Georgia Pub. Serv. Comm.* (1948), 203 Ga. 832, 49 S. E. 2d 38; *Hutchinson v. Hutchinson Gas Co.* (1928), 125 Kan. 346, 264 P. 68; 73 Corpus Juris Secundum 1010.

Presumably, it was in order to prevent such an impermissibly burdensome result that *Slagle* adopted the principle that the effect of reversal was to reinstitute the rates charged by the utility before the order complained of. But those rates are ones the commission has rejected as unreasonable. That act might be based upon some legal fiction that the old rates are still constructively or presumptively filed. Yet, the practical effect is that this court would be directly ordering a utility to charge rates found to be unreasonable by the commission, rates which differ from those actually on file and which are only marginally and technically more defensible than any other past rate schedule.

The statutory framework for utility rate-making conflicts with such a holding. Various statutes require that public utility rates "shall be just, reasonable, and not more than the charges allowed by law or by order of the Public Utilities Commission" (R. C. 4905.22); that a utility's rates shall not differ from those "specified in its schedule filed with the Public Utilities Commission which is in effect at the time" (R. C. 4905.32); and that if the utility "does or causes to be done, any act or thing * * * declared to be unlawful" it is liable in treble damages to the person, firm or corporation injured thereby (R. C. 4905.61).

The heart of this statutory plan is that the only proper rate is that set out in the approved rate schedule on file with the commission and open to public inspection, and that this schedule can be changed only by an order of the commission.

R. C. 4909.17 provides, in part, that:

"No rate, joint rate, toll, classification, charge, or rental, no change in any rate, joint rate, toll, classification, charge, or rental, and no regulation or practice affecting any rate, joint rate, toll, classification, charge, or rental of a public utility shall become effective until the Public Utilities Commission, by order, determines it to be just and reasonable * * *."

Even more specific is R. C. 4909.15, which provides, in part, that after the commission has ordered that a new rate be substituted for an existing one " * * * no change in the rate, fare, toll, charge, rental, schedule, classification, or service, shall be made, rendered, charged, demanded, exacted, or changed by such public utility without the order of the commission, and any other rate, fare, toll, charge, rental, classification, or service is prohibited."

For this court to require, upon penalty of treble damages, that a public utility change its rates before the commission itself has ordered a change, would be to require the utility to directly violate R. C. 4909.15.

No such result was intended by the General Assembly in its delineation of the authorities of the commission and of this court. Rather, the statutes make clear that public utilities are required to charge the rates and fees stated in the schedules filed with the commission pursuant to the commission's orders; that the schedule remains in effect until replaced by a further order of the commission; that this court's reversal and remand of an order of the commission does not change

or replace the schedule as a matter of law, but is a mandate to the commission to issue a new order which replaces the reversed order; and that a rate schedule filed with the commission remains in effect until the commission executes this court's mandate by an appropriate order. This holding is consistent with the basis of this court's jurisdiction, with precedent and established practice, and with the statutory framework for public utility rate-making.

I D.

The difficulty which today's holding does pose is that the customers of public utilities may be charged a rate found by this court to be unreasonable or unlawful during the period preceding the execution of this court's mandate by an order of the commission. There are a number of answers to this difficulty.

First, the "unfairness" is often merely technical or wholly illusory. In both *General Telephone* and *CEI*, *supra*, it was the utility which appealed the rate orders. In the former case, the order was found by this court to be technically insufficient, but upon remand the commission reinstituted exactly the same rates which it had originally found reasonable. *Slagle*, *supra*. There is no apparent unfairness in charging that same rate in the brief interim period. In *CEI*, this court found that the rates granted were too low, so that any delay in adopting a new rate schedule would tend to continue rates which this court had found to be unreasonably low. If there is any unfairness in this, it is to the utility and not to the consumers.

Second, even in cases where this court finds that rates should be reduced, the commission has a clear responsibility to do this promptly. If it becomes apparent that there will be a long delay in establishing

new rates, the commission also has authority to temporarily alter rates under the emergency powers of R. C. 4909.16.

Third, the practical problems of administering rate hearings and appeals therefrom necessarily cause delays, and there is simply no way that an immediate and perfect modification of utility rates can be achieved. The language quoted with approval in *Keco*, *supra* (166 Ohio St.), at page 259, applies with equal force in this case:

"It may seem inequitable to permit the defendant to retain the difference in the rates collected under the May 28, 1953, order of the commission and the rates finally fixed by the commission on June 4, 1954, but absolute equity in a particular case must sometimes give way to the greater overall good. In adopting a comprehensive scheme of public utility rate regulation, the Legislature has found it impossible to do absolute justice under all circumstances. For example, under present statutes a utility may not charge increased rates during proceedings before the commission seeking same and losses sustained thereby may not be recouped. Likewise, a consumer is not entitled to a refund of excessive rates paid during proceedings before the commission seeking a reduction in rates. Thus, while keeping its broad objectives in mind, the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation."

II.

As mentioned above, appellant has urged that the present case is distinguishable from *Slagle*, because in that case the entire order of the commission was struck

down for failing to comply with the statutory requirements as to the form of an order, whereas in this case the order was formally sufficient, but was reversed in part because this court found that some of the commission's findings were unreasonable and unlawful. That distinction would have the paradoxical effect of permitting a utility to charge rates after this court had in fact found them to be unreasonable and unlawful, but, under *Slagle*, of forbidding the utility to charge rates which the commission had found to be reasonable and which this court had not actually even considered. In any event, since we find that the rule itself is faulty, we need not further consider whether an exception to it should be adopted.

We also need not address the constitutional issues raised by the appellants.[8]

III.

We hold that the rates in effect for appellant prior to the commission's November 28, 1973, opinion and order were not reinstated by operation of law when this court reversed that order in part. The June 16, 1975, order of the commission, which so held, is unlawful and it is therefore reversed.

Order reversed.

O'NEILL, C. J., W. BROWN and P. BROWN, JJ., concur.

HERBERT, J., concurs in the syllabus and the judgment only.

CORRIGAN, J., concurs in paragraph two of the syllabus and in the judgment.

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[8] This opinion has been a lengthy one. Its intent was to make fully clear why this court today overrules an opinion rendered without dissent only a year ago. This court is more accustomed to detecting and correcting the errors of others than its own. It is to be hoped that we will always remain willing to correct them whether found in either place.

CELEBREZZE, J., concurs in paragraph one of the syllabus only.

HERBERT, J., concurring in syllabus and judgment. I do not now quarrel with the first paragraph of the syllabus, although I have doubts that it is necessary to a resolution of this cause. I view the second paragraph of the syllabus as a presently needed declaration of the legal principle suggested by the practical effect of *Keco Industries v. Cincinnati & Suburban Bell Tel. Co.* (1957), 166 Ohio St. 254. As noted below, this principle was not carried into the *Keco* syllabus.

Keco arose because, on May 28, 1953, the utility in that case was awarded a rate increase by the commission and the city appealed to this court. (*Cincinnati v. Pub. Util Comm.* [1954], 161 Ohio St. 395.) Finding the increase to be unreasonable and unlawful, the court reversed the order setting new rates and, on May 25, 1954, the cause was remanded to the commission for further proceedings. On June 4, 1954, the commission ordered the rates reduced. Subsequent thereto, Keco Industries sued the utility, alleging that the latter had been unjustly enriched by the amount of the rate increase charged between May 28, 1953, and June 4, 1954.

Paragraph two of the *Keco* syllabus states:

"Where the charges collected by a public utility are based upon rates which have been established by an order of the Public Utilities Commission of Ohio, the fact that such order is subsequently found to be unreasonable or unlawful on appeal to the Supreme Court of Ohio, in the absence of a statute providing therefor, affords no right of action for restitution of the increase in charges collected during the pendency of the appeal."

It is clear to me that the above words, "pendency of the appeal," refer to the preceding phrase, "appeal to the Supreme Court of Ohio." Throughout the opinion, Judge Mathias leaves no doubt of his intention in this regard. At page 258, the opinion states:

"In the present case we have rates which were established by the proper designated authority after a hearing and consideration in full compliance with the law, and, *until such time as they were set aside by the Supreme Court*, they were, in the absence of a stay, the lawful rates and the *only* ones which could be collected by the utility." (Emphasis added in part).

And, again, at page 259:

"From the above consideration it is our conclusion that the rates of a public utility in Ohio are subject to a general statutory plan of regulation and collection; that any rates set by the Public Utilities Commission are the lawful rates until *such time as they are set aside* as being unreasonable and unlawful *by the Supreme Court* * * *." (Emphasis added.)

It would seem logical that an appeal to this court is concluded when an entry of judgment is entered here, or, with more certainty, when an order of remand is issued and the mandate of the court is officially entered upon the record. However, as described in *Keco*, this court issued its mandate on May 25, 1954, and the commission's responding order was not entered until June 4.

If the appeal to this court was no longer pending after May 25, logic would dictate that the increase in rates charged during the above ten-day period would have fallen outside both the syllabus and the opinion in the case. However, the court's final judgment denied restitution for the entire period sought.

When this court decided *Gene Slagle, Inc., v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 44, *Keco* was the only Ohio precedent from which guidance was available.[9] A reading of both the opinion and syllabus of *Keco* left open the question of the status of a PUCO order which has been reversed by this court as unlawful and unreasonable, and which has not been supplanted with a subsequent order from that agency. As a pure legal issue, *Slagle* filled that void in a manner which seemed as natural as night following day—when a PUCO order is finally reversed, it simply has no further effect in law; and the relative positions of parties which had been altered by the order reverted, from the time of reversal to the time of a new order, to that which existed in the absence of the order. At the time *Keco* was announced, such a conclusion was not only logical, it was also practical.

Unfortunately, the same does not obtain today. The logic of the premise remains, but its practicality has dissolved under a mountain of delay, occasioned by a deluge of filings in an agency which must do its best to cope with the 70's while statutorily geared for the 40's.

In *Keco*, as heretofore noted, only ten days elapsed between this court's mandate and the responding PUCO order. Eighteen years later, as illustrated in *Slagle*, the period of time between this court's mandate and the agency order had ballooned to 85 days.

As I now view it, our error in *Slagle* was not in announcing an invalid principle of law, it was in our

[9] I remain convinced that *Cincinnati & Suburban Bell Tel. Co. v. Pub. Util. Comm.* (1923), 107 Ohio St. 370, could not reasonably have provided a precedent for deciding the issue involved in Slagle, nor is it of value to us in the instant cause.

understandable unwillingness to accept, as inevitable, the inordinate delays now associated with important PUCO decisions. Hence, the instant syllabus and judgment represent the acceptance of, and a necessary response to, reality.

As a regulated monopoly, appellant's production and marketing of its product rests mainly in the hands of the legislative branch of our state government. This is so with all public utilities in Ohio. Equally entrusted to the General Assembly is an obligation to protect the interests of the consumer of the utility's product. It has long been recognized that balancing these often competing and always vital concerns is a serious and demanding responsibility, the totally satisfactory execution of which has been elusive to some of the best minds of our times.

As stated by the trial judge in *Keco*, "* * * the Legislature has attempted to keep the equities between the utility and the consumer in balance but has not found it possible to do absolute equity in every conceivable situation." Apparently, the viability of that observation has not diminished with time. Hopefully, however, the search continues for a permissible result which will put it to permanent rest.

As heretofore stated, the somewhat paradoxical conclusion that a reversed PUCO order remains efficacious in the absence of a concomitant stay of its execution results, in my opinion, from a recognition of extant exigency. At the heart of this determination, however, would seem to be the thought that R. C. 4903.13 withholds from this court the power to remand a cause to the PUCO, for its further consideration, in the absence of an accompanying reversal, vacation or modification. Were it not so, the outcome in *General Telephone Co. v.*

Pub. Util. Comm. (1972), 30 Ohio St. 2d 271, *Slagle*, and the instant cause below could have been different, and the litigatory thrashings about which have ensued as a result of those cases could have easily been avoided.

My suggestion in this regard should not be interpreted as an advocacy of advisory opinion writing, as I doubt that such a drastic alteration of the traditional posture of the Ohio Judiciary would, or could, necessarily follow from a utilization of the above procedure. As a matter of fact, this court has already employed the method in at least two cases, both of which concerned an area of the law involving the same basic derivative jurisdiction as does the cause at bar. See *B. F. Keith Columbus Co. v. Bd. of Revision* (1947), 148 Ohio St. 253, 74 N. E. 2d 359; *T. F. Scholes, Inc., v. Bowers* (1956), 166 Ohio St. 67, 139 N. E. 2d 7; R. C. 5717.04; R. C. 4903.13; Section 2 of Article IV of the Constitution of Ohio (as amended November 7, 1944); Section 2 (B) (2) (c) of Article IV of the Constitution of Ohio (as amended May 7, 1968). It has yet to be suggested that the court's disposition of those two appeals, under their facts, was anything but permissible, appropriate and efficient.

In the field of public utility law, there exists a constitutionally recognized need for broad cooperation between this court and the agency whose heavy burden it is to execute its statutory function as expeditiously as possible. The presence of authority in this court to remand without reversal may now be worthy of serious consideration. Perhaps it would constitute a worthwhile contribution to the efficiency so sorely needed and diligently pursued by many in state government today.

GENERAL TELEPHONE COMPANY OF OHIO, APPELLANT, *v.* PUBLIC UTILITIES COMMISSION OF OHIO ET AL., APPELLEES.

[Cite as General Telephone Co. v. Pub. Util. Comm. (1976), 46 Ohio St. 2d 124.]

Public Utilities Commission—Jurisdiction—Reversal of order, and remand to commission.

(No. 75-937—Decided May 5, 1976.)

APPEAL from the Public Utilities Commission.

This is an appeal from an entry of the Public Utilities Commission of Ohio terminating a complaint proceeding.

The history of this litigation stretches back six years. On April 9, 1970, General Telephone Company (the company) filed an application with the Public Utilities Commission for authority to increase its rates. Hearings were held and evidence taken, and on August 17, 1971, the commission filed its opinion and order approving an increase less than that requested by the company. Appeal was taken to this court by the company, and, on June 21, 1972, the court rendered its decision (*General Telephone Co. v. Pub. Util. Comm.*, 30 Ohio St. 2d 271, 285 N. E. 2d 34), which reversed the commission's order for failing to set forth in sufficient detail the reasons prompting that order, and remanded the cause with instructions to set forth those reasons.

The commission thereupon reissued its opinion and order, on September 29, 1972, conforming to this court's mandate and authorizing the same rates previously granted to the company, rates which the company had maintained since November 16, 1971.

On September 5, 1973, Gene Slagle, Inc., on its own behalf and on behalf of others similarly situated (complainants), filed a complaint with the commission, alleging that this court's reversal of the commission's August 17, 1971, order voided the rate increase authorized to the company and, by operation of law, suspended the schedules of rates filed by the company pursuant to that order. The complaint also alleged that the company violated several statutory provisions by continuing to collect the rates authorized by the order, and that these violations were knowing, wanton, and willful. The commission was requested to find as a conclusion of law that the complainants were entitled to collect from the company all moneys paid to the company by its subscribers in excess of the schedules of rates established prior to November 16, 1971, for the period of June 21, 1972, to the present date, plus treble damages as provided by R. C. 4905.61, plus interest and reasonable attorney's fees.

The company filed a timely motion pursuant to Section 1.09 of the commission's Code of Rules and Regulations for an order dismissing the complaint for failing to state a claim upon which relief could be granted. The commission, considering the matter upon the motion to dismiss and various memoranda in support and contra, sustained the motion, thereby dismissing the complaint in an order dated January 10, 1974.

Appeal was taken to this court, and in *Gene Slagle, Inc., v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 44, 322 N. E. 2d 640, the court reversed the order of the commission, concluding, at page 46, that "when the order of August 17, 1971, was reversed by this court, the increased rates pursuant to such order could no longer be lawfully charged, and those rates in effect

prior to the above order were reinstated by operation of law, and continued in effect until further order of the commission."

The mandate of this court was issued on April 18, 1975, and was stayed pending appeal to the United States Supreme Court until May 13. On April 21, the complainants filed a motion before the commission for an order executing the judgment and mandate of this court. On May 12, the company filed an answer to the original complaint, setting out 13 defenses. In its order upon the motion and answer, dated June 10, 1975, the commission found that the decision of this court in *Slagle* was determinative of all the issues raised by the complainants and that the commission was without jurisdiction to proceed further in the matter other than to carry out the mandate of this court.

A timely appeal of that order was filed by the company. The complainants were permitted to intervene as appellees.

The cause is now before this court upon an appeal as of right.

Messrs. Power, Jones & Schneider, Mr. John Robert Jones and *Mr. Andrew T. Jones*, for appellant.

Mr. William J. Brown, attorney general, *Mr. Charles S. Rawlings, Mr. Marvin I. Resnik* and *Mr. Ronald E. Prater*, for appellee Public Utilities Commission.

Messrs. Muldoon, Pemberton & Ferris and *Mr. David L. Pemberton*, for appellees Gene Slagle, Inc., et al.

Per Curiam. This case is an appeal from a commission's order which found that this court's decision in

Slagle was determinative of all the issues raised by the complainant in that case. For the reasons stated in *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.* (1976), 46 Ohio St. 2d 105, decided this day, and on authority of that case, the order of the commission is reversed, and the cause is remanded to the commission for further proceedings in conformity with this court's decision in *Cleveland Elec. Illuminating, supra.*

Order reversed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

THE SUPREME COURT OF THE STATE OF OHIO

No. 75-937

1976 TERM

To wit: June 4, 1976

THE STATE OF OHIO,
City of Columbus.

GENERAL TELEPHONE COMPANY OF OHIO,
Appellant,

vs.

PUBLIC UTILITIES COMMISSION OF OHIO, ET AL.,
Appellees.

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. .... Page ....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 4th day of June, 1976.

THOMAS L. STARTZMAN, *Clerk.*

By ....., Deputy.

Before

THE PUBLIC UTILITIES COMMISSION OF OHIO

No. 73-655-T

In the Matter of the Complaint of GENE SLAGLE INC., 463 East Center Street, Marion, Ohio 43302, on his own behalf and on behalf of all subscribers of General Telephone Company of Ohio,

Complainants,

vs.

THE GENERAL TELEPHONE COMPANY OF OHIO, 100 Executive Dr., Marion, Ohio, 43302,

Respondent.

Relative to the Respondent allegedly charging and collecting rates for which no effective rates or schedules has been filed or maintained on or after June 21, 1972.

ENTRY

Pursuant to Mandate of the Supreme Court of Ohio

This matter came on to be considered by the Commission pursuant to the mandate of the Supreme Court of Ohio issued April 17, 1975 on reversal in *Gene Slagle Inc. v. Pub. Util. Comm.* (1975), 41 Ohio St. 2d 44 of the order of the Commission herein on January 10, 1974 dismissing the Complaint of Gene Slagle v. The General Telephone Company of Ohio.

On April 21, 1975 Complainant herein filed its motion for an order executing judgment in conformity with the mandate of the Supreme Court of Ohio above referred to, and requesting the Commission to include

in its order or entry at least the findings set forth in the Appendix attached thereto incorporated in the motion by reference. (See said Appendix to Motion for details)

On May 12, 1975, Respondent, The General Telephone Company of Ohio, filed its answer to the complaint setting forth thirteen defenses thereto, together with a memorandum in support. Respondent's theory, supporting the filing of its answer to the complaint, is that the Court having reversed the order of the Commission dismissing the complaint, it is now entitled as a matter of due process, to put the complaint to issue. Respondent urges that the Motion to Dismiss is tantamount to a demurrer under previous pleading rules and practices, wherein all allegations of operative facts are admitted to be true for the purpose only of testing the statement of a justiciable cause of action. (Now a complaint)

Respondent contends that under the decision of the Court, the complaint remains before the Commission and that the Commission should undertake to resolve the merits of its defenses through further proceedings.

The Complainant contends that further proceedings before this Commission are not contemplated let alone required by the opinion and mandate of the Court. Complainant asserts that the Motion to Dismiss may not be construed in the manner urged by Respondent since the facts are not in dispute and the Supreme Court has found that the Commission erred in the legal principles applicable to those facts.

If issues of fact remained to be established, undoubtedly the Supreme Court would have remanded the complaint to the Commission for further proceedings consistent with the Court's decision. This was not done which must be construed as decisive of all of the issues raised by Complainant in its Notice of Appeal. Thus

the Commission is without jurisdiction to proceed further in this matter other than to carry out the Mandate of the Court.

On August 17, 1971, the Opinion and Order of the Commission was issued granting General's application for a rate increase in an amount less than sought by the Company. The rates pursuant to this Order of the Commission did not go into effect until November 16, 1971 because of restraints against price and wage increases by the Federal Government.

The Opinion and Order of the Commission was timely appealed to the Supreme Court and on June 21, 1972 the Court issued its decision reversing the Opinion and Order of the Commission on the ground that the Opinion and Order failed to recite sufficient facts to support the rate of return authorized and was not in conformity with the requirements of Section 4903.09 R. C. Because of that failure the Order of the Commission was set aside. *General Telephone Co. v. Pub. Util. Comm.*, 30 Ohio St. 2d 271 at page 277.

The Mandate for compliance with this decision was received by the Commission on July 10, 1972. On September 29, 1972 the Commission in compliance with the Mandate issued its Opinion and Order confined to a detailed description supporting the rate of return allowed in the August 17, 1971 Opinion and Order. In all other aspects, the August 17, 1971 Opinion and Order was reaffirmed.

The Complaint herein was filed September 5, 1973. General filed its Motion to Dismiss on November 7, 1973 and on January 10, 1974 General's Motion to Dismiss the Complaint was sustained and the Complaint was dismissed. Motion for rehearing having been denied on March 7, 1974, Complainant filed its appeal to the Supreme Court on May 6, 1974, and on January 29, 1975 the Court issued its decision reversing the dismissal of the Complaint. The Mandate pursuant thereto was issued by the Court on April 17, 1975.

WHEREFORE, and in compliance with the Mandate of the Court, the Commission now makes the following findings of law, to wit:

1. That when the Order of August 17, 1971 was reversed by the Supreme Court, the increased rates pursuant to such Order could no longer be lawfully charged; and

2. That the rates in effect prior to the August 17, 1971 Order were reinstated by operation of law; and

3. That pursuant to the decision of the Supreme Court issued June 21, 1972 said increased rates could no longer be lawfully charged and collected thereafter until further order of the Commission; and

4. That the Opinion and Order of the Commission issued September 29, 1972 pursuant to the Mandate of the Supreme Court in the General rate case, supra, authorized the same rates which it had previously granted; and

5. That inclusion of the specific "findings" requested by Complainant are not in conformity with the mandate herein.

WHEREFORE, it is ordered

1. That copies of this Entry be served upon all parties hereto.

THE PUBLIC UTILITIES COMMISSION OF OHIO

C. LUTHER HECKMAN, *Chairman*
SALLY W. BLOOMFIELD,
DAVID SWEET, *Commissioners*

Entered in the Journal June 10, 1975

A True Copy:

RANDALL G. APPLEGATE, *Acting Secretary*